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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 34

SEARS, ROEBUCK AND CO., a New York corporation,
Petitioner,

v.

BRUCE A. MACKEY, individually, and TIME SAVER TOOLS, INC., an Illinois corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT.

The issue before the Court is properly and solely that of the interpretation and effect to be given to Rule 54(b) as amended.

For reasons not too difficult to discern, the respondents in their brief have raised many more issues than did either the petition for writ of certiorari or the petitioner's brief.[1]

[1] Compare the "Questions Presented" in the respondents' brief with the "Questions Presented" in the petition for writ of certiorari, on the basis of which the writ was granted.

They attempt to relegate the issue upon which certiorari was granted to a secondary position and, in so doing, demonstrate both a lack of confidence in the opinion and reasoning of the Court of Appeals below and a disregard for the rules of the Supreme Court with respect to certiorari review. The respondents have also found it necessary or desirable to advance at least one theory and argument not otherwise to be found in the record of the case.

Thus, the respondents contend that apart from amended Rule 54(b) an appeal would lie from the District Court to the Court of Appeals under two Congressional enactments (28 U. S. C. Sections 1291, 1292), and under *former* Rule 54(b). These contentions (except as to Section 1292) were presented, briefed, and argued at considerable length before the Court of Appeals, which plainly refused to pass on them.

> "In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b)." *Mackey* v. *Sears, Roebuck and Co.*, 218 F.2d 295, at p. 299; R. 40, at p. 46.

Apparently taking the view that one United States court is much like another,[1] the respondents would have the Supreme Court now settle a question upon which the Court of Appeals deliberately withheld decision. However, this Court does not often act as a substitute or replacement for the courts of appeals; rather, in a case arising on certiorari, the Court exercises a selective power to review

[1] This view also appears in the argument on amended Rule 54(b), where the respondents urge that the district courts are the appropriate courts for deciding the finality of orders, i.e., for deciding the jurisdiction of the courts of appeals.

the determinations of the lower courts. If the Court of Appeals below does not reach a question, the Supreme Court has "no occasion to decide" it. *Owens* v. *Union Pacific Railroad Company*, 319 U. S. 715, 724-725, 87 L. Ed. 1683, 1689 (1943); *Calmar Steamship Corp.* v. *United States*, 345 U. S. 446, 456, 97 L. Ed. 1140, 1147 (1953).

The respondents' invitation to the Court to assume the tasks of the Court of Appeals is made in apparent disregard of Rule 23 (1) (c) of the Rules of the Supreme Court, as amended effective July 1, 1954, which provides that the statement of a question presented in a petition for certiorari "will be deemed to include every subsidiary question fairly comprised therein". "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." The issue of the statutory finality of an appeal to a court of appeals is hardly "subsidiary" to, or "comprised" within, questions relating to the proper interpretation of Federal Rule 54(b),[3] that is, the questions presented in the petition. To the contrary, as both briefs here and the arguments and opinion below make clear, statutory finality is a separate legal question.

Considerations of judicial policy also make it desirable to confine the issues to the questions relating to Rule 54(b) presented in the petition. The Rule 54(b) controversy is the only matter upon which the Court below suggested that this Court grant certiorari. See *Mackey* v. *Sears, Roebuck and Co.*, 218 F. 2d 295, at p. 298; R. 40, at p. 44. Furthermore, it is the Rule 54(b) issue which gives rise to conflict in the views of the various courts of ap-

[3] Thus, the proponents of the affirmative interpretation of amended Rule 54(b) frequently argue that the Rule is intended to avoid questions of statutory finality. Cf. Resp. Br., pp. 28-30.

peals and individual judges thereof; and it is the Rule 54(b) dispute which requires clear resolution. On the other hand, issues of finality under the jurisdictional statute, while sometimes difficult, are neither novel nor the subjects of inter-court controversy. As Mr. Chief Justice Taft once observed, in a case where a court of appeals had wrongfully refused to provide equitable review, "On this review by certiorari, we could consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. On such an issue alone, however, we would not have granted the writ, because, except for the important question of practice, the case was not of sufficient public interest to justify it. We think it better, therefore, to reverse the judgment of the Circuit Court of Appeals, and to remand the case to that court. . . ." *Liberty Oil Company* v. *Condon National Bank,* 260 U. S. 236, 245, 67 L. Ed. 232, 237 (1922). See also *Rosenthal* v. *New York Life Insurance Company,* 304 U. S. 263, 82 L. Ed. 1330 (1938); *Cities Service Oil Company* v. *Dunlap,* 308 U. S. 208, 84 L. Ed. 196 (1939).

In the search for a basis for appellate jurisdiction more persuasive than that accepted by the Court below, the respondents have also recklessly seized upon Section 1292(1) of Title 28 of the United States Code, which allows appeals from interlocutory orders granting or denying injunctions. The record is wholly devoid of any motion or request for an interlocutory injunction, or any interlocutory order with respect to a motion or request for injunction, or any notice of appeal from such an interlocutory order upon an injunction. The only injunction sought was a *permanent* injunction, as an ancillary part of the ultimate relief requested in Count I, if and when the respondents' claims were decided upon favorably. Furthermore, this theory of appellate jurisdic-

tion was neither disclosed in the Court of Appeals nor did it appear in the respondents' brief in opposition to the petition to this Court. The theory appears for the first time, as a frivolous afterthought, in the final argument to this Court. Under these circumstances the argument is certainly "not open." *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391, 92 L. Ed. 17, 20 (1947); see also *Kay* v. *United States*, 303 U. S. 1, 4-5, 82 L. Ed. 607, 610-611 (1938); *Duignan* v. *United States*, 274 U. S. 195, 200, 71 L. Ed. 996, 1000 (1927).

The sole issue upon this review remains the issue of how to construe Rule 54(b) as amended; that is, the issue determined by the Court of Appeals and presented in the petition for writ of certiorari. Upon the Rule 54(b) issue the respondents' novel contribution is the repeated observation, contradicting the court below, that there is no longer a conflict in the circuits.[4] See Resp. Br. pp. 7, 9, 11, 24, 25, 37. But cf. *Mackey* v. *Sears, Roebuck and Co.*, 218 F. 2d 295, 297-298; R. 40, 42-44. Sometimes further exaggerating the support for their position, the respondents argue that not only all courts but all persons agree that an affirmative purpose is intended to be accomplished by Rule 54(b), "except for petitioner, (and) only Flegenheimer, now expressly overruled." Resp. Br., p. 11.

For its part, the petitioner has nowhere suggested that all or most courts agree with its view. Indeed a show of

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[4] The respondents at times modify the extreme statement by admitting that at least one of the courts of appeals remains recalcitrant. At the top of page 9 of the respondents' brief it appears that "all" courts agree with the respondents' view of Rule 54(b), but below on the same page, the District of Columbia Court of Appeals does not agree. For the purposes of this argument, therefore, "all" means something less than each and every.

hands in the courts of appeals, for what such a count is worth, would give a preponderance to the respondents' position. However, it is something less than candid to argue that "except for petitioner" no one can resist the affirmative interpretation of Rule 54(b), and to cite the *Rieser* case[5] for this statement. In that case, strangely enough in the face of respondents' argument, an unreconstructed Judge Frank wrote an elaborate opinion fully supporting the petitioner's position and restating his agreement with the reasoning of the *Flegenheimer* case.[6] Moreover, both opinions in the *Reiser* case, opposed to each other on Rule 54(b), were essentially *obiter dicta*, in the nature of advisory opinions to the Supreme Court in the pending case of *Sears, Roebuck and Co.* v. *Mackey*, as Judge Clark made clear. See *Rieser* v. *Baltimore and Ohio Railroad Company*, 224 F. 2d 198, at p. 200. And the opinion of Judge Clark, certainly favorable to the respondents' view, simply reiterated and added little to arguments he had already set forth at length in the *Pabellon* and *Lopinsky* cases. See *Pabellon* v. *Grace Line*, 191 F. 2d 169; *Lopinsky* v. *Hertz Drive-Ur-Self Systems*, 194 F. 2d 422. Thus, the *Rieser* case scarcely involves an about-face in the second circuit, as the respondents so stridently assert.[7]

Apart from the situation in the second circuit, the Court of Appeals for the District of Columbia has consistently, and does currently, follow the views of Judges Learned Hand, Frank, and Hastie. See *Gold Seal Co.* v.

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[5] **Rieser v. Baltimore and Ohio Railroad Company, 224 F. 2d 198.**

[6] **Flegenheimer v. General Mills, Inc., 191 F. 2d 237.**

[7] **The court of appeals for the second circuit, as is well-known, does not sit en banc to reconcile intra-court conflicts; thus, two panels of the court may reach opposite results in different cases.**

Weeks, 209 F. 2d 802, 810-811; *Capital Transit Co. v. District of Columbia*, —— F. 2d ——, 21 Fed. Rules Serv. 54 b. 4, Case 7; cf. *Creel* v. *Creel*, 184 F. 2d 449, 452. Moreover, there has been a sharp division of views in the third circuit. *Bendix Aviation Corp.* v. *Glass*, 195 F. 2d 267, 277.

When, therefore, the respondents assert that only the petitioner fails to walk in the new sunlight of Rule 54(b), they unkindly and unflatteringly ignore a good-sized company of judges of the courts of appeals. The respondents' dismissal of these judges is wholly unnecessary, since the Rule 54(b) issue is not likely to be decided in this Court by counting or, more accurately, throwing out "votes" below.

Elsewhere, the respondents argue that some kind of review of Rule 54(b) orders may occur even under the affirmative view of the Rule.[8] The exact nature of such

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[8] See Resp. Br. pp. 38-39. To illustrate the point, the respondents have erroneously cited, among other cases, the **Gold Seal** and **District 65** cases. In the **Gold Seal** case, the Court clearly **repudiated** the affirmative view of Rule 54(b), and the case can hardly provide an illustration of review under that interpretation. "The fact that the motions judge, in the order sought to be reviewed, characterized the same as a final judgment upon a separate claim cannot make the order such a judgment or the claim such a claim, if the claim fails to meet the standard of separateness or distinctness required by the law and the judgment fails to meet the standards of finality so required. . . . With due deference to our colleagues in the United States Court of Appeals for the Third Circuit we feel obliged to follow the position taken in the cases decided in the Second Circuit." **Gold Seal Co. v. Weeks**, 209 F. 2d 802, 810-811. In the **District 65** case the Court observed that abuse of Rule 54(b) would inevitably lead to the modification or repeal of the Rule. This statement is not the equivalent of reviewing a Rule 54(b) order. The decision in the **District 65** case was made on altogether different grounds than the respondents represent. See **District 65, Etc. v. McKague**, 216 F. 2d 153; Pet. Br., pp. 43-44 (summary).

review is left undefined. But while it is true, as the petitioner pointed out in its original brief,[9] that some courts will review Rule 54(b) orders for a determination whether "multiple claims" exist, this kind of review is a very long way from review for the statutory finality required of an appealable order or decision. Especially does this form of review fall short if any "claim" may be disposed of "finally" under Rule 54(b) "without regard to the relationship of the particular claim to the other claims," as the respondents state on page 34 of their brief. It is a basic characteristic of a final decision in the statutory sense that it disposes of a separate and independent claim.[10]

Finally, following the argument of some courts, the respondents declare that amended Rule 54(b) is "procedural" because it affects only the "timing" of appeals. Resp. Br., pp. 34-35, 37. This is a play on words. In a sense, the statutory test of finality is itself only a test of "timing", the "time" for appeal being fixed by the lower court's final action. Does this mean that the jurisdictional statute is also only a matter of "procedure"?

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[9] Pet. Br., pp. 39-41.

[10] See **Reeves v. Beardall**, 316 U.S. 283, 86 L. Ed. 1478 (1942). In their discussion of this case, the respondents have attached little significance to the Supreme Court's observation that, to be final, an order disposing of one claim of "multiple claims" must dispose of a separate and distinct transaction or occurrence.

CONCLUSION

The proper issue before this Court remains the issue whether Rule 54(b) should and can be construed to empower the district courts to determine the jurisdiction of the courts of appeals irrespective of Section 1291 of the Judiciary Title. In their argument, respondents have omitted to explain, among other things, how the jurisdictional statute can be replaced by a rule of district court procedure.

Respectfully submitted,

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